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Issue Date: 30 August 2005

Case No: 2005-LHC-00590

OWCP No.: 5-0114939

In the matter of

CAROLYN WELLS
Claimant,

v.

NORFOLK SHIPBUILDING
AND DRY DOCK COMPANY
Employer.

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act (hereinafter the Act), 33 U.S.C. § 901 et. seq. brought by Carolyn Wells (Claimant) against Norfolk Shipbuilding & Dry Dock Company (Employer).

The issues raised by the Parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Newport News, Virginia on May 13, 2005. All Parties were afforded a full opportunity to adduce testimony and offer documentary evidence. The following exhibits were received into evidence:

1. Joint Exhibit (JX) 1;
2. Claimant's Exhibits (CX) A – C, F & H;
3. Employer's Exhibits (EX) 1 – 11, 13.

Based on the following stipulations of the Parties at the hearing, the evidence introduced and the arguments presented, I find as follow:

I. Stipulations

1. An employer/employee relationship existed at all relevant times.

2. The Parties are subject to the jurisdiction of the Act.

3. Claimant suffered an injury on September 13, 2002, suffering injuries to her back and left knee while working for Employer.

4. A timely notice of injury was given by Claimant to Employer.

5. A timely claim for compensation was filed by Claimant.

6. Employer filed a timely First Report of Injury with the Department of Labor.

7. Claimant's average weekly wage at the time of this injury was $666.26 per week resulting in a compensation rate of $444.17.

8. Claimant has been paid benefits as documented on the enclosed LS-208 dated December 28, 2004. (JX 1 at 3). Temporary total disability from September 14, 2002 to December 26, 2002, at $444.17 per week for 14 weeks, 6 days for a total of $6,599.10; temporary total disability from December 28, 2002 to February 16, 2003, at $444.17 per week for 7 weeks, 2 days for a total of $3,236.10; temporary total disability from February 25, 2003 to June 12, 2004 at $444.17 per week for 67 weeks for a total of $30,076.65 and permanent partial disability, 10% to the left lower extremity, at $444.17 per week for 28.8 weeks for a total of $12,792.10.

9. Claimant was paid a permanent partial disability rating for 10% to the left lower extremity for a total of 28.8 weeks beginning June 13, 2004.

10. Claimant's treating physician is Dr. Arthur Wardell, Wardell Orthopedics, P.C., 5818 B Harbour View Blvd., Suite B2, Suffolk, VA 23435.

II. Issues

1. Whether Claimant's injury to her left shoulder, left hip and right knee are related to her work-related accident of September 13, 2002.

2. Whether Claimant is permanently and totally disabled as a result of her work-related accident of September 13, 2002.

3. Whether Claimant is entitled to reimbursement for payment of certain medical expenses.

4. Whether Claimant is entitled to a de minimis award.

5. The extent of impairment to Claimant's left knee.

III. Findings of Fact

Claimant's Testimony

Claimant was employed as a first-class shipfitter with Employer for twenty-four years. (Tr. 32-33). This position required installing steel plates with a great deal of lifting and climbing. On September 13, 2002, Claimant was injured. On this day, her specific task was to install a piece of equipment on a vessel. While picking up supplies, Claimant was hit in the left leg by a car. (Tr. 34).

After the accident Claimant was taken to the emergency room. (Tr. 35). Claimant had x-ray's taken and was given medication. No broken bones were found and Claimant was instructed to return to Employer. After reporting to Employer's medical department, Claimant was sent home for the day.

Claimant later picked Dr. Richard Wright as her treating physician. (Tr. 37; CX A). Dr. Wright diagnosed Claimant with a bone contusion to her left knee. (Tr. 38-39; CX H). Claimant also visited Dr. Michael Barnum and Dr. Stephen Kirven. (CX H at 4). According to Claimant, these physicians disagreed on the proper treatment for Claimant. Dr. Wright recommended sending Claimant back to work on light-duty as of December 10, 2002. (Tr. 40). Dr. Wright specifically found Claimant capable of working an eight hour day with limited physical activity. (CX A at 29-31). Dr. Kirven said Claimant could return to full-duty. (Tr. 40). Claimant was then referred to Dr. Arthur Wardell, who she has received treatment from since 2003. (Tr. 41, 70). Dr. Wardell diagnosed Claimant with a disk bulge and an angular tear. (CX A at 28a). On March 12, 2003 Dr. Wardell gave Claimant a lumbar epidural steroid injection. (CX A at 28b).

On December 22, 2003 Claimant underwent a functional capacity evaluation. According to Claimant, this test found that Claimant could go back to work for two to four hours a day and do light lifting. (Tr. 51; EX 4 at 4). Claimant returned to work on January 19, 2004 and continued working until February 12, 2004. Claimant tried to return to work on May 7, 2004, but was told there were no opportunities within her restrictions. (Tr. 82). These restrictions were permanent and placed on Claimant by Dr. Wardell on May 7, 2004. The restrictions stated that Claimant can sit no more than an hour a day, lift no more than ten pounds for no more than two hours a day, walk or stand for no more than an hour a day, cannot kneel or squat, can participate in desk-work type, work at a cash register for no more than one hour a day without taking a break. (CX A at 6). Claimant testified that she received a new set of restrictions on September 7, 2003 from Dr. Wardell that stated Claimant was permanently and totally disabled. (Tr. 54). However, on cross-examination, Claimant read Dr. Wardell's report from that date and admitted it did not state she was permanently and totally disabled. (Tr. 76; EX 1 at 4). Claimant also affirmed that on March 31, 2005, Dr. Wardell released Claimant to full-duty, light-duty, sedentary jobs. (Tr. 79; CX A at 2).

Claimant underwent decompression therapy. (Tr. 47). Claimant stated that she continued to report soreness and pain in the lumbar region, but the doctors continued with the therapy. (Tr. 47; CX A at 14). Claimant testified that she even asked for the decompression sessions to be discontinued, but the doctors refused. Claimant's

complaint that this physical therapy worsened her pain is also documented in Dr. Anuradha Daytner's medical records. (CX A at 10).

In June, 2003 Claimant had arthroscopic surgery to repair the torn ligament in her left leg. (Tr. 50). According to Claimant, the surgery was unsuccessful. She still had complaints of pain, throbbing, burning and tingling in both legs. (Tr. 51).

Claimant also testified that she uses a walking aid, such as a cane or a walker. (Tr. 56-57). Claimant stated that she uses the cane most of the time because she does not know when her legs may give out. Furthermore, a ten percent disability rating has been assigned to Claimant's knee by Dr. Wardell. (Tr. 81).

Claimant also underwent vocational rehabilitation in February, 2004. Claimant testified that she underwent testing to see what she was capable of doing in another capacity of work. This report found Claimant was suitable for office assistant and clerical positions. (CX B at 20-20a). Claimant testified that she applied for these positions, however, some of them were no longer in service, some of them were filled and most were not within Claimant's restrictions. (Tr. 61). A labor market survey was also completed in August, 2004. (CX B at 17). This survey stated that Claimant would have difficulty finding a job within the restrictions of working only one hour a day. (Tr. 63; CX B at 17). The survey listed only one job as suitable for Claimant. This was a position as a telephone surveyor, which paid nine to ten dollars an hour.

On September 8, 2004, Claimant was contacted by Barbara Byers to complete a labor market survey. (CX B at 28). Claimant told Ms. Byers that her restrictions at that time was a permanent disability and she was not supposed to be working. (Tr. 64). Ms. Byers sent Claimant five certified letters listings jobs available within her restrictions, but Claimant did not apply for them. (Tr. 84). On cross-examination, Claimant specifically affirmed that she did not apply for cashier, receptionist, dispatcher or hearing aid repairer, even though Dr. Wardell approved these jobs on December 20, 2004. (Tr. 85; EX 7 at 29-32). Furthermore, Claimant stated that she has not applied for any positions since December 12, 2004. (Tr. 87). Claimant affirmed that since September, 2004 she has never received permission to return to work by any physician.

Claimant also underwent pain management. These sessions were conducted by Dr. Hansen, a neurologist. (Tr. 66). According to Claimant, her treating physician recommended this treatment, but Employer continued to refuse to pay for it. (CX C at 1). Claimant asserted there are also doctor visits, emergency room treatments and other medical expenses related to her injury, including gas mileage expended traveling to vocational rehabilitation appointments, which Employer needs to reimburse. (Tr. 68; CX F).

Testimony of Mr. Ted Koehl and Videotape

Mr. Koehl is a licensed private investigator who has worked for High Tower Investigations for six years. (Tr. 90-91). Mr. Koehl was hired to observe Claimant,

which he did for eleven minutes on February 23, 2005.

The videotape demonstrated that on February 23, 2005 Claimant did not use her cane most of the time. (EX 10-A). In fact, the only time she relied on the cane was walking from her car to Dr. Wardell's office. (EX 10). Dr. Wardell's office notes indicate Claimant used a cane on other office visits but there is no evidence that any doctor prescribed a cane. (CX A at 1). She did not need the cane while walking in front of her house and in other parking lots. The videotape did demonstrate that Claimant has a slight limp.

Medical Records of Dr. Arthur Wardell

Dr. Wardell examined Claimant for the first time on February 10, 2003 after she was referred to him by Dr. Wright. (CX A at 27). Dr. Wardell ordered a functional capacity evaluation (FCE), which was completed on December 22, 2003. Based on the results of this evaluation, Dr. Wardell stated Claimant could return to work for four hours a day and progress as tolerated. (EX 4). In a January 16, 2004 report, Dr. Wardell reaffirmed Claimant could return to work based on the restrictions outlined in the FCE. (EX 1 at 1).

On March 19, 2004 Dr. Wardell issued a report stating Claimant had a ten percent permanent partial impairment to her left lower extremity as a result of her left knee injury. (EX 1 at 2; CX A at 9). Claimant continued to visit Dr. Wardell on a monthly basis. Dr. Wardell continued to prescribe Percocet and recommend Claimant undergo pain management treatment. (EX 1 at 3-4).

In December, 2004 Dr. Wardell approved four job descriptions as suitable for Claimant. Specifically, he approved full-time work as a receptionist, a hearing aid repairer, a customer service representative and a dispatcher. (EX 2; EX 7 at 29-32). In total, Dr. Wardell approved twenty-seven available jobs in the labor market survey. On December 17, 2004 Dr. Wardell also completed a "Medical Source Statement of Ability to do Work-Related Activities" regarding Claimant. (EX 3). This form reaffirmed Claimant's restrictions of limited lifting, standing and sitting. In March, 2005 Dr. Wardell reiterated that Claimant had a permanent partial disability, but was capable of working eight hours within his restrictions. (CX A at 2). As recently as April 12, 2005 Dr. Wardell summarized his records by stating that he allowed Claimant to work in a sedentary position four hours a day from May 7, 2004 until December 20, 2004 and from December 20, 2004 Claimant was capable or working sedentary positions full-time. (CX A at 0; EX 1 at 5).

Deposition and Records of Barbara K. Byers

Ms. Byers is a vocational rehabilitation counselor and a licensed professional counselor. (EX 6 at 5; EX 8). Ms. Byers was able to review Claimant's records and met her briefly, but never had a vocational evaluation interview with her. In September, 2004 Employer contacted Ms. Byers to complete a vocational evaluation and labor

market survey to identify employment available for Claimant. In order to prepare, Ms. Byers reviewed Claimant's medical records and some Office of Workers' Compensation Program rehabilitation records. (EX 6 at 7). Ms. Byers specifically noted that she was well aware of Claimant's restrictions in making her evaluation. (EX 6 at 8). In those records, Ms. Byers found that Claimant had previously received assistance from the Department of Labor, but that file was closed as of August, 2004. Ms. Byers also reviewed Claimant's educational and employment background.

In Ms. Byers' survey she was able to find a variety of jobs including sedentary cashiers, dispatchers for various types of businesses such as wrecker service, auto glass service, gift shop clerk at one of the local hospitals, parking attendant with the City of Norfolk, credit card collector with Household Finance, unarmed security guard, receptionist, bus driver and toll collector. (EX 6 at 12). Ms. Byers testified that these jobs fell within the recommendations of both Dr. Daytner and Dr. Wardell. (EX 6 at 12-13). Claimant was then notified of these potential jobs. Ms. Byers sent letters listing the employers and their contact information. In total, Ms. Byers sent six different letters between September 8, 2004 and October 25, 2004. The only response given by Claimant was that she did not need any kind of vocational assistance because she believed she was totally disabled. (EX 6 at 14).

Dr. Daytner declined to review these jobs because he did not examine Claimant recently enough. However, Dr. Wardell did and approved several of the jobs on a full-time basis. (EX 6 at 15; EX 2). On December 20, 2004, Dr. Wardell approved the dispatcher and alarm dispatcher positions, which encompassed ten different jobs. He approved the customer service positions, which covered seven different jobs. He also approved the hearing aid repairer, receptionist, cashier, phone operator, office specialist and clerk positions. Ms. Byers testified that Claimant did not apply for any of these positions. She contacted each of the employers on the survey and none of them had an application for Claimant.

On cross-examination, Ms. Byers admitted she was unaware of Claimant's participation in vocational rehabilitation with the Virginia Employment Commission. (EX 6 at 25). She also admitted she was unaware Claimant had applied for a customer service position with the Williamsburg Plantation, a receptionist position with Advanced Roofing System, as well as, her attendance at the forum on Higher Education Center of Virginia Beach. Ms. Byers did assert that based on her review of Claimant's file, Claimant has not made a good effort to find work. (EX 6 at 32).

Ms. Byers' survey listed several cashier positions. (EX 7 at 14). Each employer described the position as sedentary. Most of the employers stated a high school diploma as the only education required and if any prior knowledge or experience was needed the employers stated they would provide the necessary training. The pay for this position ranged from $5.75 per hour to $11.00 per hour.

Ms. Byers' survey also listed several dispatcher positions. (EX 7 at 14). Each of these positions is described as sedentary. The main requirements of this position

include knowledge of the Tidewater area, good communication skills and some computer skills. Each employer also stated they were willing to provide any necessary training. The pay for these positions ranged from $6.25 to $13.46 an hour.

The survey also listed driver positions. (EX 7 at 14). The employers listed had openings for either a bus driver or a van driver. The physical demands were descried as light, but mostly sedentary. Each position required a valid drivers' license and a high school diploma. The employers also stated they would provide any necessary training. The wages for these positions ranged from $9.00 per hour to $12.00 per hour and one employer listed the wages as $40.00 to $50.00 per day.

Ms. Byers also listed several positions that fall into a customer service category. This category includes jobs described as gift shop clerk, credit card collector, service advisor, customer service representative, inbound order sales associate, receptionist, toll collector and counter person. (EX 7 at 14). Most of these employers required some computer or keyboard experience, as well as good communication skills or customer service skills. The wages for these jobs ranged from $6.50 to $12.00 per hour. The physical demands of these positions was described as either sedentary or light, except for the counter person position at Chesapeake Bagel Bakery, which requires the employee to stand, reach and bend.

Ms. Byers also listed unarmed security guard positions. (EX 7 at 14). Each of these positions requires the employee to do some standing and walking, but no lifting. The employers noted that they will provide any necessary training. The wages for security guards ranged from $7.00 to $9.00 per hour.

The remaining positions in the survey were parking attendant, meter monitor, hearing aid repairer and pinner/trimmer. (EX 7 at 14). The employers described the physical demand as light. None of the requirements were outside of Claimant's capabilities. This included good hand eye coordination for the hearing aid repairer and the ability to handle cash for the parking attendant position.

Vocational Records from Office of Workers' Compensation Program and from Robin Stromberg

On December 4, 2003 Claimant was contacted by the Office of Workers' Compensation Programs (OWCP). (EX 9 at 1). The letter requested that Claimant contact the office to enroll in the rehabilitation program to help Claimant return to suitable employment. On December 18, 2003 another letter was issued notifying Claimant that she had still not contacted the office and it was assumed she was not interested in vocational rehabilitation services. (EX 9 at 2). Claimant eventually replied and OWCP referred her to Robin Stromberg, a rehabilitation counselor.

Ms. Stromberg conducted a survey on August 10, 2004. (EX B at 4). This survey identified several jobs, mostly under the category of customer service or office assistant. (EX B 17). The average salary for these jobs was the minimum wage. Ms.

Stromberg conducted another survey in April, 2004. This survey had positions with Williamsburg Plantation, TNT Marketing, Inc., Advanced Roofing Systems, Hampton Baptist Church and G & A Productions. (EX B at 20). The pay for these positions ranged from $6.00 to $7.50 an hour.

IV. Discussion

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Banks v. Chicago Grain Trimeers Ass'n, Inc., 390 U.S. 459, 467 reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 556(d). The APA specifies the proponent of the rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994) aff'g 990 F.2d 730 (3d Cir. 1993).

Causation

To establish a prima facie claim for compensation, a claimant does not need to affirmatively establish a connection between the work and the harm. Section 20(a) of the Act provides a claimant with a presumption that her condition is casually related to her employment if she shows that she suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. See U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 614-15 (1982); Merrill v. Todd Pac. Shipyards Corp., 25 BRBS 140, 144 (1991); Gencarelle v. General Dynamics Corp., 22 BRBS 170, 174 (1989), aff'd, 892 F.2d 173 (2d Cir. 1989). Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the elements of physical harm. Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359 (5th Cir. 1982). However, as the Supreme Court has noted, "[t]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Indus., 455 U.S. at 615.

Once the claimant has invoked the presumption, the burden of proof shifts to the employer to rebut it with substantial countervailing evidence. Merrill, 25 BRBS at 144. Substantial evidence is defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 8652, 865 (1st Cir. 1982). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. See Del Vecchio v. Bowers, 296 U.S. 280, 286 (1935).

The Parties stipulated that Claimant suffered a work-related injury to her back and left knee. (JX 1). Claimant also argues she injured her left shoulder, left hip and right knee in that same work-related accident. The medical records support this assertion. On March 26, 2003, Claimant's treating physician noted that Claimant's injury to her left knee has "caused her overuse injury to her right knee." (CX A at 27). On May 7, 2003, Claimant again returned to her physician complaining of an increase in pain in her right knee, as well as her back and left knee. (CX A at 26). Claimant also sought treatment for pain in her hips. Notably, the physician gave Claimant an epidural steroid injection on July 11, 2003 to deal with pain in her back and hips. (CX A at 24). The records from the Center of Pain Management also indicate that Claimant was experiencing shoulder pain after the accident and any activity involving her arms aggravated the injury. (CX C at 12). I find Claimant has invoked the Section 20(a) presumption as to her left shoulder, left hip and right knee.

Once the claimant has invoked the presumption, the burden shifts to the employer to rebut the claimant's prima facie case with substantial countervailing evidence. James v. Pate Stevedoring Co., 22 BRBS 271 (1989). The employer must present specific and comprehensive medical evidence proving the absence of, or severing the connection between, such harm and the employment or the working conditions. Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989); James, 22 BRBS at 274. In this case, Employer has not offered any evidence to sever causation in regards to Claimant's left shoulder, left hip or right knee pain. Consequently, I find that Employer has failed to rebut the Section 20(a) presumption. Therefore, the weight of the evidence supports the conclusion that Claimant suffered a work related harm to her left shoulder, left hip and right knee.

Nature and Extent

Having established work-related injuries, the burden rests with Claimant to prove the nature and extent of her disability, if any, from those injuries. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989). Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette Western Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when her condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Ltd., 14 BRBS 395 (1981).

Left Shoulder, Left Hip and Right Knee

While the evidence supports the conclusion that Claimant suffered a work related harm to her left shoulder, left hip and right knee, Claimant has not demonstrated that she has any current problems relating to these injuries. Instead, the evidence demonstrates that any injuries to Claimant's left shoulder, left hip or right knee were

temporary, treated and resolved during the period Claimant was receiving temporary total disability payments. Claimant has not received treatment for any of these injuries since 2003. By 2004, Drs. Datyner and Wardell were solely concentrating on Claimant's complaints of left knee and back pain. (CX A at 7-8, 10-11). Claimant has not offered any additional evidence to indicate that she continues to feel pain in any additional areas. Furthermore, Claimant did not testify to any continuing pain in her left shoulder, left hip or right knee. Therefore, as Claimant appears to have recovered, I find these injuries to have been temporary in nature and to have resolved prior to March 2004.

Left Knee

The Parties stipulated that Claimant suffered an injury to her left knee at work on September 13, 2002. (JX 1). Claimant originally received treatment from Dr. Wright (Tr. 37; CX A). In February, 2003 Dr. Wright referred Claimant to Dr. Wardell, who has treated Claimant's left knee since that referral. (Tr. 41, 70; CX A at 27). On March 19, 2004 Dr. Wardell issued a report stating Claimant had reached maximum medical improvement with regard to her left knee injury and had a 10% permanent partial impairment. (EX 1 at 2; CX A at 9). Claimant now alleges she has more than a 10% impairment; however, there are no records of any other doctors diagnosing Claimant with a larger impairment rating. Claimant also admitted in her testimony that Dr. Wardell has not increased this impairment rating since issuing the March, 2004 report. (Tr. 81). Accordingly, I find Claimant's left knee reached MMI on March 19, 2004, with a 10% permanent partial impairment.

Back

The Parties stipulated that Claimant suffered an injury to her back at work on September 13, 2002. (JX 1). Both Drs. Wardell and Datyner treated Claimant's back since this work-related injury. While Dr. Wardell did conclude Claimant had reached MMI regarding her left knee, he deferred to Dr. Datyner when discussing treatment on Claimant's back. (CX A at 9). In a March 31, 2004 report, Dr. Datyner noted Claimant had continued to feel cervical and lumbar pain since September 13, 2002, but now had reached MMI. (CX A at 8). The work restrictions placed on Claimant in May, 2004 and in December, 2004 continue to note Claimant's back pain and her limited mobility. (CX A at 6). Accordingly, I find Claimant reached MMI on her back on March 31, 2004.

Extent of Left Knee and Back Disability

The Parties also dispute the extent of Claimant's left knee and back disability. The question of extent of disability is an economic as well as medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the Act means an incapacity, as a result of an injury, to earn wages, which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive a disability award, she must have an economic loss coupled with a physical or

psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co v. Rambo (Rambo II), 512 U.S. 121 (1997). A claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss, or a partial loss.

A claimant who is unable to return to her former employment due to her work-related injury establishes a prima facie case of total disability. Elliot v. C&P Tel. Co., 16 BRBS 89, 92 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339, 342-43 (1988). The burden then shifts to the employer to show the existence of suitable alternative employment. Trans-State Dredging v. Benefits Review Bd., 731 F.2d 199, 200 (4th Cir. 1984); Rinaldi v. General Dynamics Corp., 25 BRBS 128, 131 (1991). A claimant who establishes an inability to return to her usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi, 25 BRBS 128. If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. Southern v. Farmer's Export Co., 17 BRBS 24 (1985).

Claimant's Prima Facie Case

Claimant testified that she is unable to return to her job as a shipfitter. (Tr. 82; CX H at 3). This testimony is supported by the medical evidence. Claimant underwent a functional capacity evaluation on December 22, 2003. The conclusion in this evaluation stated Claimant could only lift ten pounds or less for no more than two hours a day, could walk or stand for no more than an hour a day, cannot climb stairs or ladders, cannot twist or bend and cannot kneel or squat. (CX A at 6). Dr. Wardell later issued a report stating Claimant can work eight hours a day, however, the restrictions from this functional capacity evaluation are permanent. (CX A at 2). The shipfitter position requires physical activity outside of these restrictions, including lifting and climbing. (Tr. 33). Based on this evidence, I find that Claimant has established a prima facie case of total disability.

Suitable Alternative Employment

Once a claimant makes a prima facie case of total disability, the burden of production shifts to the employer to establish the existence of suitable alternative employment for which the claimant could realistically compete if she diligently tried. Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 540 (4th Cir. 1988) (citing Trans-State Dredging v. BRB, 731 F.2d 199, 200 (4th Cir. 1984)). An employer can establish suitable alternative employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and the claimant is capable of performing such work. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171 (1986); Darden v. Newport News

Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986). In the alternative, the employer can meet this burden by showing the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for claimant in the geographic area. Royce v. Erich Constr. Co., 17 BRBS 157 (1985); see also Williams v. Halter Marine Serv., 19 BRBS 248 (1987). For job opportunities to be realistic, the employer must establish the precise nature and terms of each job and pay for the alterative jobs. Moore v. Newport News Shipbuilding & Dry Dock Co., 7 BRBS 1024 (1978). The employer must produce evidence of realistically available job opportunities within the claimant's local community which she is capable of performing considering her age, education, work experience and physical restrictions. Trans-State Dredging v. BRBS, 731 F.2d 199 (4th Cir. 1984).

Employer has not offered Claimant any positions in its facility since Claimant was injured and restricted to light duty. Employer, however, has offered vocational evidence to meet its burden. Employer relies on the labor market survey conducted by Barbara K. Byers to show suitable alternative employment. The survey listed several positions, which the Court finds appropriate for Claimant considering her physical restrictions, employment history and educational background.

Ms. Byers is a licensed rehabilitation counselor and a licensed professional counselor. (EX 6 at 5). She preformed a labor market survey from May 9, 2004 until the date of the hearing. (EX 7 at 14). In order to prepare this report Ms. Byers examined Claimant's medical records and Office of Workers' Compensation rehabilitation records. (EX 6 at 7). Based on this information, Ms. Byers was able to locate twenty-seven employment opportunities available to Claimant that were within her physical restrictions. After completing the survey, Ms. Byers sent a copy to Dr. Wardell. On December 20, 2004 Dr. Wardell approved almost every position, including the customer service, the hearing aid repairer, receptionist, cashier, phone operator, office specialist and clerk positions. (EX 6 at 15; EX 2). According to Dr. Wardell's records, Claimant was capable of working in full-time sedentary positions as of December 20, 2004. (EX 1 at 5).

Ms. Byers' survey listed several cashier positions. (EX 7 at 14). Each employer described the position as sedentary. Most of the employers stated a high school diploma as the only education required and if any prior knowledge or experience was needed the employers stated they would provide the necessary training. The pay for this position ranged from $5.75 per hour to $11.00 per hour.

Ms. Byers' survey also listed several dispatcher positions. (EX 7 at 14). Each of these positions is described as sedentary. The main requirements of this position include knowledge of the Tidewater area, good communication skills and some computer skills. Each employer also stated they were willing to provide any necessary training. The pay for these positions ranged from $6.25 to $13.46 an hour. I find each of these positions to be suitable alternative employment for Claimant.

The survey also listed driver positions. (EX 7 at 14). The employers listed had openings for either a bus driver or a van driver. The physical demands were descried as light, but mostly sedentary. Each position required a valid drivers' license and high school diploma. The employers also stated they would provide any necessary training. The wages for these positions ranged from $9.00 per hour to $12.00 per hour and one employer listed the wages as $40.00 to $50.00 per day. I find these positions to also be suitable alternative employment.

Ms. Byers also listed several positions that seem to fall under a customer service category. This category includes jobs described as gift shop clerk, credit card collector, service advisor, customer service representative, inbound order sales associate, receptionist, toll collector and counter person. (EX 7 at 14). Most of these employers required some computer or keyboard experience, as well as good communication skills or customer service skills. The wages for these jobs ranged from $6.50 to $12.00 per hour. The physical demands of these positions were described as either sedentary or light, except for the counter person position at Chesapeake Bagel Bakery, which requires the employee to stand, reach and bend. Based on the description provided in the survey I find this position to be outside Claimant's physical restrictions and not suitable alternative employment. However, I find that all other positions dealing with customer service are suitable.

Ms. Byers also listed unarmed security guard positions. (EX 7 at 14). Each of these positions requires the employee to do some standing and walking, but no lifting. The employers noted that they will provide any necessary training. The wages for security guards ranged from $7.00 to $9.00 per hour. I find Claimant capable of performing each of these positions and each to be suitable alternative employment.

The remaining positions in the survey were parking attendant, meter monitor, hearing aid repairer and pinner/trimmer. (EX 7 at 14). The employers described the positions' physical demand as light. None of the requirements were outside of Claimant's capabilities. This included good hand eye coordination for the hearing aid repairer and the ability to handle cash for the parking attendant position. The wages for these last four positions ranged from $6.90 to $9.19 an hour.

Therefore, I agree with the survey's and Ms. Byers' conclusion that there are positions within Claimant's restrictions, which are appropriate given her education and past work experiences. The survey demonstrates that there are a range of jobs existing in the Tidewater area, which are reasonably available and which Claimant could have realistically secured and preformed. See Lentz v. Cottman Co., 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988). The conclusions drawn in the survey are credible, as it demonstrates an awareness of Claimant's age, education, work experience, and Ms. Byers specifically testified she was well aware of Claimant's physical restrictions when making her evaluation. (EX 6 at 8); see Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985). Employer has demonstrated that suitable alternative employment existed as of December 20, 2004, the date Claimant's treating physician found Claimant capable of working eight hours a day and performing most of the jobs in this survey.

The compensation rates for these positions ranged from $5.75 to $13.46 per hour. Averaging the range of compensation of these available jobs, the Court finds Claimant has a wage earning capacity of $384.00 per week effective December 20, 2004.

Due Diligence

Claimant may nevertheless prevail in her quest to establish total disability if she demonstrates that she tried diligently and was unable to secure employment. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). The claimant must establish a reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by the employer to be reasonably attainable and available and must establish a willingness to work. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1043 (5th Cir. 1981).

Claimant asserts she has diligently sought employment, but has been unable to locate a suitable position within her physical limitations. From February, 2004 until June, 2004 Claimant worked with Robin Stromberg, a vocational rehabilitation counselor assigned to Claimant by the Department of Labor. Ms. Stromberg conducted a survey on August 10, 2004, which identified several jobs mostly under the category of customer service or office assistant. (CX B at 17). However, Ms. Stromberg stated that with Claimant's physical restrictions she would have difficulty finding employment. According to Claimant, her restrictions at the time were sedentary work for a maximum of one hour per day. There was only one position in the survey that could accommodate her and it was located in Pittsburgh, Pennsylvania. (Tr. 63). Ms. Stromberg had previously conducted another survey in April, 2004. (CX B at 20). This survey identified five potential positions. Claimant testified that she applied; however, she stopped pursuing these jobs after Dr. Wardell changed her restrictions in May, 2004.

The medical evidence does not support Claimant's assertion that in August, 2004 she was only able to work one hour per day. According to Claimant's treating physician's records, Claimant's restrictions were sedentary work, four hours a day from May, 2004 until December 20, 2004, and from December 20, 2004 to the present and continuing, Claimant was capable of working sedentary full-time work. (CX A at O). Consequently, I find Claimant's testimony that Dr. Wardell recommended that she not work to not be credible. While Claimant did appear to work with Ms. Stromberg, it also seems Claimant misinformed the vocational specialist about the extent of her disability. Claimant's credibility regarding the extent of her disability is also called into question by the videotape surveillance conducted by Ted Koehl. Claimant testified that she needed a walking aid, such as a cane or walker. (Tr. 56-57). In contrast, the videotape showed Claimant did not use her cane most of the time. In fact, in the video she only used the cane to walk into Dr. Wardell's office. (EX 10-A).

Claimant's reluctance to find suitable alternative employment is also evident in the records and deposition of Barbara Byers. Ms. Byers conducted a labor market survey in September, 2004. After locating numerous positions that she found suitable

for Claimant, she tried to contact Claimant on six different occasions. (EX 7). However, Claimant only responded by stating she did not need any kind of vocational assistance because she believed she was totally disabled. (EX 6 at 14). She continued to assert she was totally disabled after Dr. Wardell approved the dispatcher positions, customer service positions, hearing aid repairer, receptionist, cashier, phone operator, office specialist and clerk positions. Ms. Byers also contacted each of the employers that she recommended to see if Claimant applied directly to them for the positions. None of them, however, had received any application material from Claimant. Ms. Byers testified that based on her review of Claimant's file, Claimant did not make a good effort to find work. (EX 6 at 32).

Therefore, I find Claimant has not established a reasonable diligence in attempting to secure suitable employment. Instead, the evidence indicates Claimant has an unwillingness to work. Employer has demonstrated the existence of suitable alternative employment that is within Claimant's physical restrictions. Furthermore, many of these positions were approved by Claimant's treating physician. Claimant's claim for total disability is denied and she is limited to permanent partial disability. I find Claimant's disability became permanent and partial on December 20, 2004, when her treating physician said she could work full-time in sedentary positions and specifically approved the positions listed in the labor market survey.

De Minimis Award

Under Section 22 of the Act, a claimant is barred from seeking a new, modified compensation award after one year from the date of denial or termination of benefits. 33 U.S.C. § 922. Thus, a disabled claimant who is presently able to earn as much or more than she did before her injury may be foreclosed from seeking compensation for the future effects of her disability if those effects are not manifested within one year of the date of denial or termination of a current award.

A de minimis or nominal award is a means by which a claimant who has no present loss of wage-earning capacity but who expects that she will in the future experience a loss of wage-earning capacity as a result of a work-related injury may avoid the time limits contained in Section 22 of the Act and thus file a timely claim when that future loss of wage-earning capacity is realized. The United States Supreme Court has held that a de minimis award is proper "when there is a significant possibility that the worker's wage-earning capacity will fall below the level of his preinjury wages sometime in the future." Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121, 124 (1997). To be entitled to a de minimis award, a claimant must establish that there is "some particular likelihood that in the future the combination of injury and market conditions may leave him with a lower [wage-earning] capacity." Id. at 128. The claimant must present evidence of a "disability that is potentially substantial, but presently nominal in character." Id. at 132.

Under Rambo II, the burden is on the claimant to establish by a preponderance of evidence that there is a significant possibility of future wage-earning capacity loss as

a result of her work-related injury. Id. at 139. The trigger is not the realization of a future physical injury, but the significant possibility of future economic harm.

In the present case, Claimant argues that she will likely suffer a future loss of wage-earning capacity due to the possible deterioration of her work-related injuries. Claimant asserts that the nature of many of her injuries is still undetermined and could worsen. Claimant also relies on trends in the workforce that are causing employers to seek employees with experience regarding computers and the internet, qualifications which Claimant does not have.

I find Claimant has not offered any supporting evidence to carry the burden of persuasion. Nothing in Claimant's testimony supports the contention that there is a significant probability that she will suffer a future loss of wage-earning capacity. Also, none of the medical reports indicate that Claimant's condition could deteriorate. In fact, Dr. Wardell's has amended Claimant's restrictions as her ailments have recovered, specifically changing her restrictions from four hours of work a day to eight hours on December 20, 2004. (CX A at 0). Therefore, I deny Claimant's claim for a de minimis award.

Medical Expenses

Section 7(a) of the Act provides that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). In order to assess medical expenses against an employer, the expenses must be reasonable and necessary, as well as appropriate. Pernell v. Capital Hill Masonry, 11 BRBS 582 (1979); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187 (1988).

At the hearing, Claimant submitted outstanding medical bills that she argues need to be paid by Employer. I find that Employer is not liable for these expenses. The issue was never presented to the District Director, nor was it listed in Claimant's Statement of Contested Issues, submitted to this Court on February 22, 2005. Instead, Claimant submitted the seventy-three pages of alleged unpaid medical expenses for the first time at the hearing. (CX F). Claimant also did not provide any supporting testimony, as I requested at the hearing, or any other evidence regarding the reasonableness or necessity of these expenses. Moreover, Claimant did not notify Employer of these expenses until four days prior to the hearing.

The record also indicates all appropriate expenses have been paid by Claimant's health care provider. (CX F at 1, 3-8, 12-18). According to precedent interpreting subsection 7(d)(1), the Act provides that an employee may only recover amounts which she herself expended for medical treatment or services. The employee cannot seek reimbursement for expenses paid by her private insurer. See Nooner v. National Steel & Shipbuilding Co., 19 BRBS 43 (1986) (holding that the employer need reimburse a claimant only for his out-of-pocket expenses for necessary medical care).

Conclusion

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

ORDER

1. Claimant was paid compensation at the appropriate rate prior to June 13, 2004.

2. Employer shall pay permanent total disability to Claimant pursuant to Section 8(a) of the Act for the time period beginning on June 13, 2004 and ending on December 19, 2004, at a compensation rate of $444.17 per week.

3. Employer shall pay permanent partial disability benefits to Claimant for her scheduled left leg injury of ten percent pursuant to Section 8(c)(2) & 19 of the Act beginning on December 20, 2004 and continuing, subject to the maximum rate of compensation allowable under Section 6(b) of the Act at a compensation rate of $444.17.

4. Employer shall pay permanent partial disability benefits to Claimant for her nonscheduled back injury pursuant to Section 8(c)(21) of the Act beginning on December 20, 2004 and continuing, based on an average weekly wage of $666.17 and a wage-earning capacity of $384.00 per week.

5. Employer shall pay for all reasonable and necessary medical expenses expended by Claimant and associated with the treatment of Claimant's work-related injury pursuant to Section 7 of the Act.

6. Claimant's claim for a de minimis award is denied.

7. Employer shall receive a credit for benefits and wages paid.

8. Employer shall pay Claimant interest on any accrued unpaid compensation benefits at the rate provided by 28 U.S.C. § 1961.

9. Within thirty days of receipt of this Order, counsel for Claimant should submit a fully-documented fee application, a copy of which shall be sent to opposing counsel, who shall have twenty days to respond.

10. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

A

LARRY W. PRICE
Administrative Law Judge

LWP/TEH
Newport News, VA